In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 866

MORRIS DUBIN, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of a $4,951.48 judgment in his favor rendered by the Court of Claims as compensation for the taking of certain equipment by the Navy Department. He argues that the amount of the judgment is inadequate and falls short of "just compensation" within the meaning of the Fifth Amendment.

1. In July 1950 petitioner purchased from the Air Force as surplus property a quantity of radar transmitter-receiver units and radar receivers at a price of $3,162.62 for the entire lot (Pet. App. 3a, 7a), which was delivered to petitioner on July 30, 1950 (Pet. App. 3a). In his contract of sale with the Air Force petitioner warranted that he would "not resell [the

instruments] at a profit" (Pet. App. 7a, 13a). However, on August 8 and 10, 1950, he purchased from private suppliers, at a total price of $1615.00, certain power units to be used with the radar transmitter-receiver units and radar receivers (Pet. App. 3a), and between August 11, 1950, and August 16, 1950, petitioner circulated to his customers an advertising bulletin offering the complete units for sale at prices greatly in excess of what he had paid (Pet. App. 3a–4a). As the Court of Claims found, "these items offered for sale had been altered by plaintiff in no particular, but were offered for sale in the cartons in which they were packed when plaintiff purchased them" (Pet. App. 3a).

Several days later the Navy Department informed petitioner that there had been a security violation and that the radar equipment purchased from the Air Force, as well as the power units purchased privately were "classified" and "related to the national defense" within the meaning of the Espionage Act, 18 U.S.C. 793 (Pet. App. 16a). As authorized by 18 U.S.C. 793(d), the Navy Department demanded that petitioner deliver the equipment to the Navy. Petitioner complied, and on August 19, 23, and 24, the Navy took possession of the equipment. (Pet. App. 4a, 16a–17a.)

Petitioner later instituted this action against the United States for the fair market value of the equipment. The Court of Claims initially filed an opinion denying the motions for summary judgment of both parties. (Pet. App. 1b–6b). After a trial the court filed a second opinion, holding that a judgment re-

turning petitioner's out-of-pocket expenses of $4,951.48 constituted "just compensation" (Pet. App. 1a–8a).[1]

2. Petitioner argues that the Court of Claims held that he was not entitled to "just compensation" or "fair value" for the equipment seized.

We do not so read the Court of Claims' decision. In its second opinion the Court of Claims first found that the equipment seized "related to the national defense" within the meaning of the Espionage Act, 18 U.S.C. 793, and, further, that the equipment was "classified" (Pet. App. 4a–7a). From this the court concluded that—in light of 18 U.S.C. 793(d)—petitioner's title was vulnerable to a demand for possession by the government (Pet. App. 7a). The court then turned to petitioner's argument that he was entitled to the fair market value of the property taken (Pet. App. 7a). The court did not hold that petitioner was not entitled to "fair market value" or to "just compensation," but merely that in the circumstances petitioner's out-of-pocket expenses were the appropriate measure of "market value" and "just compensation" (Pet. App. 7a–8a). The court reasoned that the warranty clause in the contract of sale between the Air Force and petitioner, whereby petitioner warranted that he would not resell the purchased property at a profit, "limited the sales price which plaintiff could charge for any of the property which he purchased under the contract to his cost. We think it necessarily follows that it also limited the amount

[1] Judge Davis filed a separate concurring opinion (Pet. App. 8a–9a).

which the defendant was required to pay upon repossession of the property" (Pet. App. 7a).

With respect to the power supply units petitioner purchased from private suppliers, the court held that, since they were purchased "in arm's-length transactions between a willing buyer and a willing seller only eleven days before repossession by defendant, what plaintiff paid would seem to be the market value of these articles" (Pet. App. 8a). The court thus included in its judgment the sums that petitioner had paid for the equipment and added $173.86 representing freight costs incurred by petitioner. They were the only costs disclosed by the record. (Pet. App. 32a–33a.) The total of all of these amounts—$4,951.48—was held to be "under all the circumstances * * * just compensation to plaintiff * * *." (Pet. App. 8a.)

The only issue actually presented is, thus, a highly limited and essentially factual one—whether, in the circumstances, $4,951.48 represented the fair market value of the property seized. Review of that question by this Court is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FEBRUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967